

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN,
DISABILITY RIGHTS WISCONSIN, INC.,
BLACK LEADERS ORGANIZING FOR COMMUNITIES,
GUILLERMO ACEVES, MICHAEL J. CAIN,
JOHN S. GREENE, and MICHAEL DOYLE,

Case No. 19-CV-00084

Plaintiffs,

Case Code 30701 & 30704

v.

DEAN KNUDSON, JODI JENSEN, JULIE M. GLANCEY,
BEVERLY GILL, ANN S. JACOBS, MARK L. THOMSEN,
MEAGAN WOLFE, and TONY EVERS,

Defendants.

**NON-PARTY BRIEF OF FORMER MEMBERS
OF THE WISCONSIN LEGISLATURE
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS**

Patrick O. Patterson, SBN 1014157
Law Office of Patrick O. Patterson, S.C.
7481 N. Beach Drive
Fox Point, Wisconsin 53217
popatterson@gmail.com
414-704-1896

Attorney for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

This case presents a question of first impression: whether the Legislature exceeded its authority under the Wisconsin Constitution when it convened in extraordinary session in December 2018 during which—in a span of less than 48 hours—it passed three bills that made sweeping changes to the laws of this State and the Senate confirmed *en masse* 82 nominees to State authorities, boards, councils, and commissions. *See* First Am. Compl., ¶¶ 27-50, 52-75. Plaintiffs argue, and *Amici* agree, that the Legislature exceeded its constitutional authority in convening the December 2018 extraordinary session, and that the actions taken by the Legislature during that session are void and unenforceable. Accordingly, *Amici* support Plaintiffs’ request for relief.

Amici—U.S. Senator Tammy Baldwin, former U.S. Senator Russ Feingold, U.S. Representative Mark Pocan, and former U.S. Representative Dave Obey—all served in the Wisconsin Legislature. Each was subsequently elected to represent Wisconsin in the United States Congress, and each has direct knowledge of the Legislature’s mandate to faithfully execute its duties and responsibilities in support of the Constitution. Wis. Const. art. IV, § 28. As such, *Amici* have a unique perspective on the limitations the Constitution imposes on the Legislature’s authority.

Senator Tammy Baldwin (D-Madison) represented the 78th Assembly District in the Wisconsin Legislature from 1993 to 1999. In 1998, Sen. Baldwin was elected to represent Wisconsin's 2nd District in the U.S. House of Representatives, serving until 2013. In 2012, she was elected to the U.S. Senate, and she was reelected in 2018. Throughout her career, Sen. Baldwin has worked across party lines to build consensus around bipartisan legislation to help Wisconsinites. In 2019, she received the Bipartisan Policy Center's Legislative Action Award, which recognizes members who have demonstrated skill and courage in the face of political challenges to confront substantive problems, provided a positive tenor to the legislative process, and offered a template for improving the functionality of the institution through their example.

Senator Russ Feingold (D-Middleton) represented the 27th Senate District in the Wisconsin Legislature from 1983 to 1993. Sen. Feingold was elected to the U.S. Senate in 1992, where he served until 2011 and gained a reputation as a political "maverick" with an independent streak. His 18 years in the Senate were marked by a willingness to support what he viewed as the best policies, regardless of the party of the legislator or President proposing those policies. His reputation for independence and bipartisanship was solidified by his work challenging earmarks and wasteful spending, his approach to the impeachment trial of President Clinton, his opposition to the USA Patriot Act, his vote to confirm Chief

Justice John Roberts, and, perhaps most notably, his long advocacy for campaign finance reform. Sen. Feingold—along with the late Sen. John McCain (R-Ariz.)—received the 1999 John F. Kennedy Profile in Courage Award for co-sponsoring the Bipartisan Campaign Reform Act (popularly known as McCain–Feingold).

Representative Mark Pocan (D-Madison) represented the 78th Assembly District in the Wisconsin Legislature from 1999 to 2013. During that time, Rep. Pocan held numerous leadership roles, including that of co-chair of the Joint Committee on Finance. In 2009, Milwaukee Magazine honored Rep. Pocan as Wisconsin’s “Best Legislator” in recognition of his reputation for forging bipartisan policy solutions. In 2012, Rep. Pocan was elected to represent Wisconsin’s 2nd Congressional District in the U.S. House of Representatives. He has been reelected to Congress in 2014, 2016, and 2018. As in the Wisconsin Legislature, Rep. Pocan has earned a reputation in Congress as an adept legislator who can bridge the political divide between Democrats and Republicans.

Representative Dave Obey (D-Wausau) represented the Marathon 2 Assembly District in the Wisconsin Legislature from 1963 to 1969. Rep. Obey played a key role in creating Wisconsin’s modern system of Technical College Districts, for which he won national recognition, and in establishing the State’s network of public broadcasting stations. Rep. Obey served as Assistant Democratic

Assembly Leader before winning election to the U.S. House of Representatives in 1968, where he served Wisconsin's 7th congressional district for 21 terms, until his retirement in 2011. Rep. Obey is Wisconsin's longest serving member of the U.S. House of Representatives and served as Chairman of the powerful House Committee on Appropriations in 1995 and again from 2007 to 2011. Rep. Obey is as well known for his willingness to fight for his values as he is for his bipartisan friendships. After retiring from Congress, Rep. Obey led a bipartisan speaking tour with former Rep. Tom Petri, a Republican who represented Wisconsin's 6th congressional district for 18 terms; on this tour, they spoke to students and the general public about the importance of civic participation in bipartisan discussions.

Amici believe that adherence to the Constitution is a fundamental element of maintaining the integrity of the State's democracy, and they recognize that the Legislature is not immune from the constitutional limitations imposed on it. *Amici* further acknowledge that the Constitution "is the mandate of a sovereign people to its servants and representatives, and [that] no one of them has a right to ignore or disregard its plain commands." *John F. Jelke Co. v. Emery*, 193 Wis. 311, 321, 214 N.W. 369 (1927).

In light of the foregoing, *Amici* have a strong interest in ensuring that the Legislature did not, and does not, intentionally or otherwise, disregard the

Constitution's limitations on its authority. *Amici* therefore submit this brief in support of Plaintiffs' request for relief.

ARGUMENT

As elected members of the Wisconsin Legislature, *Amici* swore an oath to support the Wisconsin Constitution. Wis. Const. art. IV, § 28. They understood that oath to mean that the Legislature could not act in excess of its constitutional authority. Accordingly, *Amici* always sought to perform their legislative work in a manner consistent with the law and the Constitution. Although extraordinary sessions were held during some *Amici*'s tenure in the Legislature, *Amici* were not directly involved in convening those sessions, and the issue presented by this case was not, to their knowledge, raised at the time.

This lawsuit brought to *Amici*'s attention, for the first time, the question presented here: whether the Legislature may constitutionally convene an extraordinary session. After reviewing the relevant legal authority, *Amici* have concluded that the Constitution and the current statutory regime do not allow the Legislature to convene such a session and therefore believe that the December 2018 extraordinary session was convened outside the Legislature's constitutional authority.

I. THE CONSTITUTION DOES NOT AUTHORIZE THE LEGISLATURE TO CONVENE IN EXTRAORDINARY SESSION ABSENT STATUTORY AUTHORITY, WHICH DOES NOT CURRENTLY EXIST.

The Wisconsin Constitution authorizes the Legislature to meet only “at such time as shall be provided by law, unless convened by the governor in special session.” Wis. Const. art. IV, § 11 (as amended in 1968). The only law providing for meetings of the Legislature is Wis. Stat. § 13.02 (enacted in 1971), which specifies that the Legislature shall meet annually in “regular session.” As scholars recognized at the time of this constitutional amendment and statutory enactment, meetings “provided by law”—known as regular sessions—and special sessions called by the Governor are the only constitutionally permissible legislative sessions. *See* R. Hedlund & W. Crane, Jr., *The Job of the Wisconsin Legislator*, at 5 (1971) (“In addition to regular sessions, the Governor is authorized to call special sessions. Such sessions are restricted to considering the subject or subjects specified by the Governor in his call.”).

The December 2018 extraordinary session did not satisfy the requirements of Article IV, Section 11. It was not part of the regular session provided for by “law,” nor was it convened by a call of the Governor. Instead, the extraordinary session was convened by a majority of the Senate and Assembly organization committees under Joint Rule 81, which itself was adopted pursuant to a joint resolution. *Assembly Journal, Dec. 2018 Extraordinary Sess.*, at 968 (Wis. 2018).

Joint Rule 81 is not a “law” within the meaning of the Constitution: it was not created by a bill passed by both houses of the Legislature, nor was it signed by the Governor or readopted by a supermajority of the Legislature over the Governor’s veto. Wis. Const. art. IV, § 17; *id.* art. V, § 10. *See also, e.g., Milwaukee Journal Sentinel v. Wis. Dep’t of Admin.*, 2009 WI 79, ¶¶ 24-25, 319 Wis. 2d 439, 768 N.W.2d 700 (legislative action that does not comply with constitutional requirements is not a “law” within the meaning of Wis. Const. art. IV, § 17).

In addition, the Constitution requires that “a majority of each [house] shall constitute a quorum to do business, but a smaller number may adjourn from day to day.” Wis. Const. art. IV, § 7. But the December 2018 extraordinary session was not convened by a majority of each house of the Legislature; rather, it was convened by a mere majority of each house’s organization committee. *Assembly Journal*, Dec. 2018 Extraordinary Sess., at 968. The organization committees do not constitute a majority of each house. *Id.*; *see also*

<https://docs.legis.wisconsin.gov/2017/committees/senate/1761>;

<https://docs.legis.wisconsin.gov/2017/committees/assembly/1654>. To the extent the Legislature now contends that Joint Rule 81 authorizes a majority of each house’s organization committee to convene a meeting of the Legislature, it disregards the Constitution’s quorum requirement. The Legislature “may not by its rules ignore constitutional restraints.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).

II. THE CONSTITUTION PROVIDES THE LEGISLATURE WITH SUFFICIENT FLEXIBILITY TO CONDUCT ITS BUSINESS.

A plain reading of the Constitution provides the Legislature with sufficient authority to meet as necessary, as long as such meetings are “provided by law” or are convened by the Governor in a special session. Wis. Const. art. IV, § 11.

Requiring conformance to the Constitution’s dictates will not impair the Legislature’s ability to conduct its business.

First, the Legislature effectively met in constitutionally authorized regular and special sessions for more than 130 years before the first extraordinary session was ever convened. (Dkt. 86 at 11.) And, in the years since, extraordinary sessions have been used only sporadically. (Dkt. 103 at 6-7.). Such extraordinary sessions are, in no way, fundamental to the proper functioning of the Legislature.

Second, the Legislature may, in accordance with the Constitution, enact a “law” authorizing meetings other than “regular sessions,” which are the only sessions currently authorized by law. *See, e.g.*, Wis. Stat. § 196.497(10)(c) and 1987 Wis. Act 4, §§ 1-2. Alternatively, the Legislature could propose a constitutional amendment—in accord with the process provided by the Constitution—to authorize extraordinary sessions. Wis. Const. art. XII, § 1.

To date, the Legislature has not enacted a law, nor has it sought to amend the Constitution to allow it to lawfully convene an extraordinary session like the one held in December 2018. Neither historical practice nor legislative convenience

overrides the Constitution's limitations on the Legislature's authority to lawfully convene a meeting to conduct legislative business. *See, e.g., INS v. Chadha*, 462 U.S. 919, 945 (1983); *NLRB v. Noel Canning*, 573 U.S. 513, 584 (2014) (Scalia, J., concurring in judgment).

Until and unless there are changes to Wisconsin law or to the Wisconsin Constitution, the Legislature does not have the authority to convene in extraordinary session. Because the December 2018 extraordinary session was unconstitutionally convened, the resultant laws and Senate confirmations are void and unenforceable.

CONCLUSION

For the reasons stated above and in Plaintiffs' memorandum of law, *Amici* urge the Court to grant the relief requested by Plaintiffs.

DATE: March 13, 2019.

Respectfully submitted,

Electronically signed by Patrick O. Patterson
Patrick O. Patterson, SBN 1014157
Law Office of Patrick O. Patterson, S.C.

Address:

LAW OFFICE OF PATRICK O. PATTERSON, S.C.
7481 N. Beach Drive
Fox Point, Wisconsin 53217
popatterson@gmail.com
414-704-1896